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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-967

CLAUDE CARTIER,

Petitioner,

v.

SECRETARY OF STATE and
COMMISSIONER OF IMMIGRATION
AND NATURALIZATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Claude Cartier, plaintiff-appellee in the proceeding below, prays that a writ of certiorari issue to review the judgment therein of the United States Court of Appeals for the District of Columbia Circuit, except so much thereof as grants the motion of the Secretary of State to dismiss his appeal.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, *App. A., pp. 3a-20a, infra*[1] is not yet reported. The Memorandum Opinion and Order of the United States District Court for the District of Columbia, *App. B., pp. 21a-25a, infra,* are reported at 356 F. Supp. 460.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, remanding the case to the United States District Court for the District of Columbia with instructions to dismiss the complaint, is dated and was entered October 30, 1974, *App. A., p. 1a, infra.* Petitioner's timely petition for rehearing, filed November 13, 1974, was denied December 31, 1974, by order entered that day. *App. A., p. 2a, infra.* The jurisdiction of the District Court was invoked under Tit. 28 U.S.C. § 1361. The jurisdiction of this Court is invoked under Tit. 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

The Board of Appellate Review of the Department of State decided that petitioner's formal renunciation of his American citizenship before an American consular officer abroad was not voluntary, and, hence, did not result in loss of his United States nationality. *The Board's decision was rendered in an adversary, quasi-judicial proceed-*

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[1] *App.* citations are to the appendices to this petition. *R.* citations are to pages of the [Joint] Appendix in the Court below, unless otherwise indicated as referring to portions of the record certified to this Court not included in the [Joint] Appendix.

ing in which the government was represented by counsel, and was final under State Department regulations. The questions presented are:

1. Whether such decision is binding and conclusive on all officers and agencies of the government, in the absence of a statutory bar to such conclusiveness.

2. Whether § 103(a) of the Immigration and Nationality Act of 1952, Tit. 8 U.S.C. § 1103(a), is a statutory bar to such conclusiveness on the Attorney General, and the respondent Commissioner, his delegate.

3. Whether § 103(a) of the Immigration and Nationality Act of 1952, Tit. 8 U.S.C. § 1103(a), empowers the Attorney General *ex parte* to review and overrule such decision and to supersede it with his own *ex parte* decision binding and conclusive on the Executive Branch.

4. Whether it was an improper deprivation of petitioner of a right to a decision, and error, for the Court of Appeals to abstain from deciding, and, by instructing the District Court to dismiss the complaint, to leave undecided, in effect as nonjusticiable, the questions set out in 1, 2 and 3 above, on the ground that it was "unnecessary and indeed unwise to attempt to resolve" them "in the context of this proceeding."

STATUTES, RULES AND REGULATIONS INVOLVED

The statutory provisions involved are those of §§ 103(a), 104(a), 349(a)(6), 358 and 360(a) of the Immigration and Nationality Act of 1952, Tit. 8 U.S.C. §§ 1103(a), 1104(a), 1481(a)(6), 1501 and 1503(a) and Tit. 28 U.S.C. §§ 1361 and 2201, which are set out in *App. C., pp. 26a-30a, infra.*

The rules involved are Rules 8(a) and 54(c) of the Federal Rules of Civil Procedure, which are set out in *App. D., p. 31a, infra.*

The regulations involved are 22 CFR §§ 7.1-7.3, 50.60-50.72, which are set out in *App. E., pp. 32a-37a, infra.*

STATEMENT

1. *The controversy and its background.* The controversy has its origin and its *raison d'etre* in the intransigent disagreement of the Immigration and Naturalization Service of the Department of Justice,[2] with a decision of the Board of Appellate Review of the Department of State,[3] final under that Department's regulations, and rendered in an adversary, quasi-judicial proceeding in which the government was represented by counsel, that petitioner's formal renunciation of his American citizenship before an American consular officer abroad, was not voluntary, and, in consequence, did not result in his loss of his citizenship under § 349(a)(6) of the Immigration and Nationality Act of 1952, Tit. 8 U.S.C. § 1481(a)(6). Solely on the ground that it disagreed with such decision, the INS refused to comply with the petitioner's request that it do an act which such decision constrained, that is, to return to petitioner his certificate of naturalization, which he had surrendered to the consular officer before whom he had formally renounced his citizenship. Additionally, and on the same ground, the INS requested the Department of State not to issue to petitioner the passport for which he had applied after the Board had rendered its decision, and the Department

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[2] Hereinafter sometimes "the INS". The respondent Commissioner heads the INS as the Attorney General's delegate. See, § 103(b), Immigration and Nationality Act of 1952, Tit. 8 U.S.C. § 1103(b); 8 CFR § 2.1.

[3] Hereinafter sometimes "the Board". The Board is the Secretary of State's delegate. See, 22 CFR §§ 7.1-7.3, 50.60.

of State refused to issue a passport to petitioner expressly only because of such request. *R.* 24-27, 6-22; No. 18, *passim*; No. 17, pp. 70-67, 86-82, 102-96, 114-113, 117-115.

Thereupon, petitioner commenced this action against the Secretary of State and the Commissioner of Immigration and Naturalization. After the District Court had rendered its decision favorable to petitioner, and while the appeal therefrom of respondent Commissioner and the Secretary of State was pending but not yet argued, the Secretary of State, appearing by attorneys of his own Department with the permission of the Solicitor General, moved the Court of Appeals to dismiss his appeal, disavowing the contentions made by the Department of Justice lawyers who had theretofor appeared both on his and the respondent Commissioner's behalf, and asserting that he agreed with the District Court's holding. At the request of the Court of Appeals, the Secretary of State submitted a memorandum of "his views on the merits of the appeal". As the Court of Appeals notes, the Secretary's "view of the governing law corresponds generally with that of" petitioner. The Secretary of State's motion was unopposed, and the Court below granted it.[4] *App. A., pp. 1a, 8a, 9a, 20a, infra.*

So far as concerns the respondent Commissioner, this action is predicated on the proposition that *res judicata* applies to decisions of administrative tribunals such as the State Department's Board of Appellate Review, rendered in adversary, quasi-judicial proceedings in which the gov-

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[4] Motions for a stay pending the appeal had been denied by both the District Court and the Court of Appeals. Accordingly, a passport had been issued to petitioner, and his certificate of naturalization had been returned. *App. A., p. 8a. R.* ____.

ernment was represented, *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421, 422 (1966), and that "there being privity" for such purpose between all officers and agencies of the government, *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402, 403 (1940), such decisions are binding and conclusive on all officers and agencies of the government, except to the extent, if any, that the Congress has provided otherwise. Cf. *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 10, 14, 15, 18-20 (1972).

In substance, respondent Commissioner contended below that *res judicata* "is ordinarily inapplicable to administrative determinations" even if "made in quasi-judicial proceedings", and that, in any event, under § 103(a), Immigration and Nationality Act of 1952, Tit. 8 U.S.C. §1103(a), the decision of the State Department's Board of Appellate Review was not only *not* binding and conclusive on the Attorney General or respondent Commissioner, his delegate, but that the Attorney General had free writ *ex parte* to review, set aside and supersede such decision with his own determination, binding on the executive branch. Petitioner's position was that § 103 (a) had no such consequence. *R.* No. ___ (Applnts. Br.), *pp.* 17, 26; *App. A., pp. 7a-8a, 9a-12a, infra.*

The District Court decided *both* issues favorably to petitioner. *App. B., pp. 21a-25a, infra.* The Court of Appeals held that it was "unnecessary and indeed unwise" to decide *either* of them, and remanded the case to the District Court with instructions to dismiss the complaint without prejudice, however, to petitioner bringing an action nominally under § 360, Immigration and Nationality Act of 1952, Tit. 8 U.S.C. § 1503, but, actually, as we shall see, under Tit. 28 U.S.C. § 2201, for a declaratory judgment that he is a national of the United States, and thus to

litigate *de novo,* the very question which had been litigated before, and decided by the Board of Appellate Review. *App. A., pp. 4a, 16a, 20a, infra.* The Court of Appeals leaves wholly undecided what it itself characterizes as "complex and difficult" and "broad and important questions concerning the scope of the Attorney General's power to make controlling determinations of law under the Immigration and Nationality Act, and the applicability of the doctrine of administrative *res judicata* to the prior ruling of the State Department's Board of Appellate Review". *App. A., pp. 9a, 11a, infra.*

The circumstances of the case are these:

Petitioner, a French citizen by birth, was naturalized as an American citizen shortly after his voluntary enlistment in the U.S. Army Air Force during World War II, and a certificate of naturalization was issued to him. Some twenty years later, petitioner executed a formal renunciation of his American citizenship in the presence of an American consular officer abroad, and surrendered his certificate of naturalization to him. The Department of State approved the ensuing consular certificate of petitioner's loss of nationality, and a copy of it was sent to INS for its information, together with petitioner's certificate of naturalization. See, §§ 349(a)(6) and 358, Immigration and Nationality Act of 1952, Tit. 8 U.S.C. §§ 1481(a)(6) and 1501; 22 CFR § 50.50. *R.* 24-27, 41, 114; No. 16, pp. 25-23, 28, 29.

Thereafter, in accordance with applicable regulations of the Department of State, 22 CFR §§ 7.1-7.3, 50.60, petitioner appealed to the Board of Appellate Review of the Department of State from the Department's administrative holding, evidenced by the consular certificate of loss of nationality and the approval thereof, that he had expatriated himself. In an adversary, quasi-judicial proceed-

ing in which the government was represented, the Board found that in renouncing his American citizenship petitioner was acting under "duress of devotion", see, *e.g., Mendelsohn v. Dulles,* 207 F2d 37 (D.C. Cir. 1953), and held that his renunciation was, accordingly, involuntary, and, as such, ineffective as an act of expatriation. See, *e.g., Nishikawa v. Dulles,* 356 U.S. 129, 133 (1958); *Mendelsohn v. Dulles, supra. R.* 59-70, 38, 39, 6-22.

Shortly after the commencement of the action, INS "referred" to the Attorney General "for resolution" the "differences" between it and the Department of State as to petitioner's "citizenship status". *R.* 47. While cross-motions for summary judgment were pending before the District Court, the Attorney General issued his "decision" on such reference, in which he concluded *ex parte* on the record before the Board, that, contrary to the Board's decision, petitioner had acted voluntarily in renouncing his citizenship, and had, accordingly, lost his United States nationality. *R.* 77-108.

2. *The action, and the decision of the District Court.* The complaint described the action as being "in the nature of mandamus" within the meaning of Tit. 28 U.S.C. §1361, and petitioner demanded judgment "directing and ordering" the Secretary of State and respondent Commissioner "to abide by the decision of the Board of Appellate Review that he had not expatriated himself" and, respectively, to "issue *** a passport in accordance with plaintiff's [*i.e.*, petitioner's] application therefor", and "return *** plaintiff's [*i.e.*, petitioner's] Certificate of Naturalization *** in accordance with the requests therefor ***". *R.* 2, 5.

On cross-motions for summary judgment, petitioner contended that since the decision of the Board of Appellate

Review of the Department of State had been rendered *in an adversary, quasi-judicial proceeding in which the government was represented by counsel,* it was binding and conclusive on all officers and agencies of the United States, who are, for the purposes of *res judicata,* in privity with one another. See, *e.g., United States v. Utah Construction & Mining Co.,* 384 U.S. 394, 421, 422 (1966); *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 402, 403 (1940); *S & E Contractors, Inc. v. United States,* 406 U.S. 1, 10, 14, 15, 18-20 (1972); *United States v. Willard Tablet Co.,* 141 F2d 141, 143 (7th Cir. 1944). Petitioner further contended that the Attorney General, whose *ex parte* "decision" in the matter had been submitted in opposition to petitioner's motion for a summary judgment and in support of respondent Commissioner's and the Secretary of State's motion for summary judgment, was wholly without authority in law to review, overrule or supersede with his own determination, the decision of the Board of Appellate Review of the Department of State. *S & E Contractors, Inc. v. United States, supra.*

It was contended, *per contra,* that *res judicata* does not attach to decisions of administrative tribunals, that under the proviso of §103(a) of the Immigration and Nationality Act, Tit. 8 U.S.C. §1103(a), the Attorney General had free writ, *ex parte,* to review, overrule and supersede with his own, *any* determination of the Secretary of State, and of his delegates, including the Board of Appellate Review, in respect of citizenship status, and that the Attorney General's *ex parte* "decision" was *the* final administrative determination in the matter, conclusive on the executive branch.

Thus were the issues joined.

The District Court granted petitioner's and denied respondent's and the Secretary of State's motion for summary

judgment, expressly sustaining petitioner's contentions and rejecting those of respondent Commissioner and the Secretary of State. *App. B., pp. 21a-25a, infra.*

In so doing, however, the District Court characterized and treated the action as "a suit to declare a determination of citizenship rights by the U.S. Department of State binding on all officers and agencies of the United States government", and granted petitioner declaratory relief rather than the mandatory relief prayed for. Thus, the District Court's Order was –

> ORDERED AND DECLARED that the decision of the Board of Appellate Review of the Department of State is binding and conclusive on all administrative agencies and officers of the United States ***

and, further, in the language fashioned by *Perkins v. Elg,* 307 U.S. 325, 350 (1939) for use in a declaratory judgment negating the right of a Secretary of State to refuse to issue a passport on a specified ground, that the Secretary of State "*may not* refuse to issue Plaintiff's passport," and that the Commissioner of Immigration and Naturalization "*may not* refuse to return Plaintiff's Certificate of Naturalization, or otherwise obstruct the issuance of his passport", on the ground that "Plaintiff has expatriated himself and has lost his United States citizenship". *App. B., pp. 21a, 25a, infra;* 356 F. Supp. 460, 461, 462. [Emphasis supplied.]

While the District Court is silent on the point, *App. B., pp. 21a, 25a, infra;* 356 F. Supp. 460, its unambiguous language in characterizing the action and in granting declaratory relief, is such as to permit no conclusion other than that the District Court was designedly exercising its right under Rule 8(a) *FRCivP* to determine the nature of the action for itself, and complying with the command of

Rule 54(c) *FRCivP* that the judgment "grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief". See, *e.g., New Amsterdam Cas. Co. v. Waller,* 323 F2d 20, 24, 25 (4th Cir. 1963), cert. den. 376 U.S. 963 (1964); *Aktiebolaget Bofors v. United States,* 194 F2d 145, 148, 149 (D.C. Cir. 1951); *Burton v. State Farm Mut. Automobile Ins. Co.,* 335 F2d 317, 320 (5th Cir. 1964). The Court of Appeals' question whether the District Court "*consciously* abandoned mandamus for another form of relief", (which like so much else in this case, it leaves undecided), *App. A., fn. 9, p. 19a, infra* [emphasis supplied], is utterly unwarranted.

3. *The decision of the Court of Appeals.* The Court of Appeals recognized, *App. A., p. 9, infra,* that "the case *** presents broad and important questions concerning the scope of the Attorney General's power to make controlling determinations of law under the Immigration and Naturalization [*sic*] Act, and and the applicability of *** *res judicata* to the *** ruling of the State Department's Board of Appellate Review." Nevertheless, the Court decided *neither* of these "complex and difficult" questions, as it described them. *App. A., p. 11a, infra.* Rather, it found "it *unnecessary* and indeed *unwise* to attempt to resolve these questions in the context of this proceeding ***". *App. A., p. 16a, infra.* [Emphasis supplied]. Accordingly, the Court below remanded the case to the District Court, with "orders that the action be dismissed without prejudice to the seeking of relief under 8 U.S.C. §1503", holding that "the District Court erred in so exercising its powers as to circumvent the remedy specifically provided by the Immigration and Naturalization [*sic*] Act", which is what it mistakenly conceived Tit. 8 U.S.C. §1503(a),

§360(a), Immigration and Nationality Act of 1952, to be.[5] *App. A., pp. 4a, 20a, infra.*

The Court below brought itself to this posture by holding that whether considered as an action in the nature of mandamus (as petitioner had considered it) or for a declaratory judgment (as the District Court characterized and treated it), the action could not be maintained because the "remedy" under §360(a), which is, expressly, "an action under 28 U.S.C. §2201", the Declaratory Judgment Act, for a judicial declaration of nationality,[6] was "more than adequate to provide appellee all the relief he has sought", thus barring mandamus, and requiring the exercise of judicial discretion to "refuse to grant declaratory relief". *App. A., pp. 19a, 20a, infra.* The Court below characterized the "remedy under" §360(a) as "a much

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[5] Although the Court below did not specify any subsection, it is clear that its reference is to subsection (a). Thus, the Court below speaks of §360 only as providing – and only subsection (a) does – "that any person within the United States [as petitioner is] who is denied a right or privilege of nationality by any United States department can initiate an action under 28 U.S.C. §2201 for a judicial declaration of nationality." *App. A., pp. 16a-17a, infra.*

[6] Thus, in pertinent part, §360(a), Tit. 8 U.S.C. §1503(a), merely provides:

> If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, on the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States ***.

more *sensible statutory* remedy *** for the disposition of the *underlying* dispute in this case", and as "the statutory remedy" which "the structure of the Act suggests *** was intended for cases of precisely this kind". *App. A., pp. 16a, 19a, infra.* [Emphasis supplied].

The Court below further extolled an action for a judicial declaration of nationality as the "better remedy" in that it can "both afford *** total relief and *** minimize judicial intrusion into the administrative decision-making process", and would be "potentially less destructive of the overall allocation of powers" between the State and Justice Departments under the Immigration and Nationality Act, whereas to decide the issues in this case, either way, would bring about "a major change in the present enforcement structure" in immigration and nationality law. *App. A., pp. 20a, 16a, 19a, infra.*

Thus, the Court below held, in effect, that the "broad and important questions" which the case presents, are non-justiciable. Curiously, the Court, would justify such abstention "when a more appropriate statutory alternative exists", on the ground that "the federal judiciary" should not "permit the enlistment of its own powers to promote *** [the] internecine warfare" between the State and Justice Departments, which this case so plainly exposes. *App. A. p. 17a, infra.* But the simple reality, which seems oddly to have escaped the Court below completely, is that "internecine warfare" between the two departments flourishes precisely *because* these "complex and difficult" questions are unresolved, and will continue wholly unabated so long as they are permitted to escape resolution. And, in the meanwhile, hapless people such as petitioner will unavoidably be caught up in it, and find themselves harshly whipsawed between two great departments of government

despite this Court's clear warning in *S & E Contractors, Inc. v. United States*, 406 U.S. 1 (1972) that they are not to be.

The desire of the Court below to "minimize judicial intrusion into the administrative decision-making process" is, of course, most commendable. But, the resolution of the questions raised by this case would involve no such intrusion. What it would involve is a determination of the conclusiveness, *vel non*, of the end-product of "the administrative decision-making process", after it had run its full course to completion.

Nor does the abstention of the Court below from deciding the issues presented by this case find support in its fear that to decide them, one way or the other, "would constitute a major change in the present enforcement structure" of immigration and nationality law, and be "destructive of the overall allocation of powers" between the State and Justice Departments. *App. A., pp. 16a, 19a, infra.* For, to find and define the legal boundary between the powers of the two departments in an area in which they are in hopeless conflict, as this case bears witness, is not to destroy, but rather to protect the "overall allocation of powers" between them. Nor is the preservation from change of the "present enforcement structure" (which would appear from what occurred in this case, to have been born of bluster and foray[7]) an objective which may properly

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[7] The "legislative history" to which the Court below takes resort, *App. A., fn. 6, pp. 15a, 16a, infra*, is utterly irrelevant; it deals only with the screening of alien immigrants, and not at all with determinations of U.S. nationality. The "double check" on the immigration of aliens is *expressly* provided for by §221(h) of the Immigration and Nationality Act of 1952, Tit. 8 U.S.C. §1201(h), as follows: (continued)

be achieved by abstention, for rights of individuals are not to be sacrificed merely because their judicial definition and enforcement might, or even would work a "major change" in a governmental "structure". See, *e.g., Baker v. Carr,* 369 U.S. 186, 198 (1962); *Powell v. McCormack,* 395 U.S. 486, 517 (1969); *Reynolds v. Sims,* 377 U.S. 533 (1964); *Wesberry v. Sanders,* 376 U.S. 1 (1964).

However that may be, the Court below structures *its* elaborate case for *not* deciding the "broad and important", and "complex and difficult", questions presented "by the case laid before" it, on two wholly untenable premises. These are (1) that an action for a judicial declaration of nationality is *the* statutory remedy provided for precisely such cases as this by §360(a) of the Immigration and Nationality Act, and (2) that such an action provides an adequate alternative remedy to both an action in the nature of mandamus and an action for a judicial declaration that the decision of the Board of Appellate Review of the Department of State is binding and conclusive.

With reference to the first of these premises, as this Court made clear in *Rusk v. Cort,* 369 U.S. 367, 375-377 (1962), §360(a) of the Immigration and Nationality Act of 1952, Tit. 8 U.S.C. §1503(a), derives from its predecessor, §503 of the Nationality Act of 1940, 54 Stat. 1137, and

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[7](continued)

> Nothing in this Act shall be construed to entitle any alien, to whom a visa *** has been issued, to enter the United States, if upon arrival at a port of entry ***, he is found to be inadmissable under this Act, or any other provision of law. ***

Visas are, of course, issued by consular officers (State Department) and ports of entry are manned by immigration agents (INS/Department of Justice).

> The legislative history of §503 indicates that Congress understood the provision for a declaratory judgment action to be *merely a confirmation of existing law*, or at most a clarification of it. [Emphasis supplied].

Indeed, before the enactment of the 1940 Act, this Court had held that where an officer of the government denies a person a right or privilege of citizenship, on the ground that he is not a citizen, an action for a judicial declaration of nationality will lie under the Declaratory Judgment Act, first enacted in 1934, 48 Stat. 955, and now codified as Tit. 28 U.S.C. §2201. *Perkins v. Elg*, 307 U.S. 325 (1939), aff'g *Perkins v. Elg*, 99 F2d 408 (D.C. Cir. 1938). And, it is merely such an action that §360 (a), Tit. 8 U.S.C. §1503(a) says that a person in the United States, so aggrieved, "may institute". *Perkins v. Elg* and *Rusk v. Cort*[8] demonstrate that in this respect §360(a) is merely declaratory of, and adds nothing to the law.

In these circumstances, contrary to what the Court below supposes, an action for a judicial declaration of nationality is *not* a tailor-made remedy provided by §360(a) of the Immigration and Nationality Act, Tit. 8 U.S.C. §1503, nor is it *the* statutory remedy of such Act, and it has, accordingly, no claim to any special quality or

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[8] The observation of the Court below, *App. A., fn. 7, p. 17a, infra*, that *Rusk v. Cort* "makes this remedy", *i.e.*, the remedy "under" §360(a), "equally available to persons not within the United States", obviously misses the whole point of that decision. In *Rusk v. Cort*, this Court held that §360 did not affect pre-existing law that an action for a judicial declaration of nationality was available to persons whether within or outside the United States, and that the latter were not, accordingly, limited to the remedy prescribed by §360(b).

position, or to exclusivity in disputes which involve nationality status. A judicial declaration of nationality is but a remedy fashioned by the courts under the Declaratory Judgment Act, Tit. 28 U.S.C. §2201, to suit the circumstances of particular cases, and that Act is more than sufficiently broad to encompass the remedy fashioned by the District Court as suitable to the circumstances of *this* case – a judicial declaration that the decision of the State Department's Board of Appellate Review was, in such circumstances, binding and conclusive on all officers and agencies of the United States. See, *Cockrell v. Board of Commissioners,* 16 F. Supp. 273 (E.D. La. 1936), rev'd on other grounds, 91 F2d 412 (5th Cir. 1937), cert. den. 302 U.S. 740 (1937); *Aetna Life Ins. Co. v. Martin,* 108 F2d 824 (8th Cir. 1945).

Nor is the Court of Appeals' premise of an adequate alternative any better founded. The Court of Appeals describes the "remedy" provided by an action for a judicial declaration of nationality, to which it would remit petitioner, as one "for the disposition of the *underlying* dispute in this case", *App. A., p. 16a, infra* [Emphasis supplied] *i.e.,* whether petitioner's formal renunciation of his citizenship was, or was not a voluntary act of expatriation. In other words, the remedy which the Court below considers an "adequate" alternative, and "more sensible" remedy, is to relitigate and invoke judicial consideration and determination *de novo* of the very question which the Board of Appellate Review of the Department of State has already heard and determined in an adversary, quasi-judicial proceeding in which the government was represented. Patently, the relitigation of issues already heard and determined is not an "adequate" alternative to, nor a "more sensible" remedy than a proceeding for a declaration that the prior determination is *res judicata;* it

is, rather, its diametric opposite and complete negation. Moreover, petitioner should not be put to the very heavy burden of relitigating if, as he contends, as the District Court has held, and the Court of Appeals *does not* gainsay, the decision of the Board is binding and conclusive on all officers and agencies of the government.

Finally, while petitioner agrees with the Court below *App. A, pp. 19a, 20a, infra,* that courts have discretion in appropriate circumstances to deny declaratory relief, remitting the suitor to some *other* remedy, that is *not* what the Court below has done here. On the contrary, the holding of the Court below is that petitioner's remedy *is,* indeed, as the District Court held, an action for a declaratory judgment, but for judgment declaring petitioner to be a citizen, rather than for judgment declaring that the decision of the Board that he had not expatriated himself, is binding and conclusive on all officers and agencies of the United States. The Court below neither expounds on principle, nor cites authority supporting any such discretion, and petitioner knows of none.

REASONS FOR GRANTING THE WRIT

1. *In refusing to determine the question whether the decision of the Board of Appellate Review of the Department of State, final under that Department's regulations, and rendered in an adversary, quasi-judicial proceeding in which the government was represented by counsel, is binding and conclusive on all officers and agencies of the United States, and in holding that petitioner's remedy is to relitigate in the courts with the Attorney General or the respondent Commissioner, the very question heard and determined by the Board, the Court below has decided a federal question in a way in conflict with applicable decisions of this Court.*

Thus, in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966), Mr. Justice White, speaking of a non-statutory administrative tribunal such as the Board, and citing, *inter alia, Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381 (1940), said for a unanimous Court:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

At the same time, 384 U.S. at 421, 422, this Court expressly *disapproved* as "being certainly too broad", the contrary language of *Pearson v. Williams,* 202 U.S. 281 (1906) and *Churchill Tabernacle v. FCC,* 160 F2d 244 (D.C. Cir. 1947) "to the effect that *res judicata* principles do not apply to administrative proceedings ***".

And, it is in this context that this Court cited with approval, 384 U.S. at 422, *Sunshine Anthracite Coal Co. v. Adkins, supra,* where Mr. Justice Douglas, speaking for the Court, said, 310 U.S. at 402, 403:

> There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government.

The Court below fully recognized the force of this Court's decision in *Utah Construction & Mining Co., supra,* but gave it *no* effect. Noting, strangely, that "the question of the

applicability of the doctrine of *res judicata* to determinations made pursuant to the Immigration and Nationality Act is *** a complex and difficult question", *App. A., p. 11a, infra,* the Court below aptly observed, *App. A., fn. 3, pp. 11a, 12a, infra,* that:

> It would appear that the rapid sweep of the law may have left the Commissioner behind. The cases that he cites in support of his argument that *res judicata* is ordinarily inapplicable to administrative determinations have been largely discredited by the Supreme Court. *See,* United States v. Utah Construction & Mining Co., 384 U.S. 394, 421, 422, n. 19, n. 21 (1966).

Then, curiously citing four non-Supreme Court cases decided before *Utah Construction & Mining Co.,* which it recognized "were decided prior to the general judicial acceptance of the applicability of *res judicata* to administrative proceedings, and thus cannot be considered definitive statements of the issue", and which are otherwise distinguishable as not involving determinations made in adversary, quasi-judicial proceedings, *App. A., pp. 13a-15a, infra,* the Court below notes that "the doctrine of administrative *res judicata* *** has not evolved into a rigid system that is to be blindly applied in every context", citing K. Davis, *Administrative Law Text* [*sic*] §18.02 at 360 (1973) for such proposition generally, and three cases as "examples" of its application. *App. A., pp. 11a, 12a, infra.* The cases cited are totally irrelevant:

Thus, in *United States v. Smith,* 482 F2d 1120 (8th Cir. 1973), the Court recognized the force of *Utah Construction & Mining Co.,* but denied a prior decision *res*

judicata effect because under the regulations of the agency involved, it was *not* final. Finality is, of course, a prerequisite to *res judicata.* See, *Commissioner v. Sunnen,* 333 U.S. 591, 597 (1948). Here, under the regulations of the Department of State, the decision of the Board of Appellate Review was final.

In *Tipler v. E.I. duPont de Nemours & Co.,* 443 F2d 125 (6th Cir. 1971) the Court also recognized the force of *Utah Construction & Mining Co.,* but denied a prior decision *res judicata* effect because the issues in the two proceedings, which arose under different statutes, were *not* identical. The identity of the issues is, of course, also a prerequisite to *res judicata.* See, *Washington, Alexandria & Georgetown S.P. Co. v. Sickles,* 24 How. [U.S.] 333, 341, 342, 344, 345 (1860). Here the issue is single, and one and the same.

Title of [*sic*] *Immigration and Naturalization Service,* 322 F2d 21, 25, n. 11 (9th Cir. 1963), at the place cited for comparison (*i.e.*, "Cf."), notes "the difficulty which can arise when determinations made under one statute are considered to be binding when a similar question arises under a different statute", quoting 2 Davis, *Administrative Law Treatise* (1958 Ed.) 578, to the effect that because of differences in legislative history, purpose and context "a determination under one statute need not necessarily be res judicata when the same question arises under the identical words of another statute". No such situation obtains in this case. *Title* was decided before *Utah Construction & Mining Co.,* and, in any event, the prior decision for which *res judicata* effect was there claimed (and denied) was not that of an administrative tribunal, but, rather, the judgment of a court under §340 of the Immigration and Nationality Act, Tit. 8 U.S.C. §1451, revoking naturalization.

Clearly, neither the early cases, the non-rigidity proposition, nor the "examples" of its application, relied on by the Court below, afford any basis for denying *res judicata* effect to the decision of the Board. But that, indeed, is the practical consequence of the abstention of the Court below from deciding the question, for by it the Board's decision is set at naught, and petitioner is left to litigate once again the very question that the Board has already heard and determined, equally as though the Court below had held that the Board's decision was not *res judicata*.

As the Court said, *per* Friendly, *J.*, in *Safir v. Gibson*, 432 F 2d 137, 142, 143 (2d Cir. 1970), cert. denied 400 U.S. 850, 942 (1970), in directing the district court to *enjoin* a government agency "not to redetermine" an issue already decided by another government agency in an adversary, quasi-judicial proceeding, "it would be quite unseemly" for an agency to "conclude that its sister agency had been wrong" in its decision "on a fully litigated issue", and, further, that

> *** the reason for applying *res judicata* to administrative agencies is not only to "enforce repose" but also to protect the successful party from being vexed with needlessly duplicitous proceedings.

See also, *Tipler v. E.I. duPont deNemours & Co.*, 443 F2d 125, 128 (6th Cir. 1971); *Painters District Council No. 38 v. Edgewood Contracting Company*, 416 F2d 1081, 1083-4 (5th Cir. 1969); *Fairmont Aluminum Co. v. Commissioner*, 222 F2d 622, 627 (4th Cir. 1955); *Seatrain Lines, Inc., v. Pennsylvania R. Co.*, 207 F2d 255, 259 (3d Cir. 1953); *United States v. Willard Tablet Co.*, 141 F2d 141 (7th Cir. 1944).

And in circumstances strikingly similar to those here, in *S & E Contractors, Inc. v. United States*, 406 U.S. 1 (1972), this Court forcefully condemned procedures which the abstention of the Court below encourages. There, this Court emphasized that despite the myriad of its departments, bureaus, offices, services, boards, administrations, commissions and the like, the government has *not* propagated by fission, and is "a unit rather than *** an amalgam of separate units". 406 U.S. at 10. Accordingly, when a question arising between an individual and an agency of the government, has been submitted for resolution to a tribunal of such agency in accordance with its regulations, and the question is thereafter finally determined by that tribunal in adversary, quasi-judicial proceedings, in which the government was represented, that is, or certainly should be the end of it. The individual does not, or should not, in the absence of a clear Congressional mandate, have to "perform the Herculean task of beheading the Hydra", or to "run the gantlet", 406 U.S. at 14, 15, of other government agencies "disposed", for one reason or another, not to agree with, or to "challenge" the resolution of the matter "on the merits", or otherwise.

In *S & E Contractors, Inc.*, the Atomic Energy Commission made a favorable determination on certain claims submitted by a contractor, awarding him a sum of money. Thereafter a certifying officer of the Commission asked the opinion of the General Accounting Office pursuant to Tit. 31 U.S.C. §82d whether a voucher for the payment of such claims could be certified. After a plenary review of the matter, the response was in the negative on the ground that the Commission's findings were "not supported by substantial evidence" and were "erroneous on matters of law". See, *S & E Contractors, Inc. v. United States*, 433 F2d 1373, 1374 (Ct. Cl. 1970), rev'd 406 U.S. 1

(1972); 46 Comp. Gen. 441 (1966). In brief, the General Accounting Office disagreed with the Atomic Energy Commission's decision, just, as here, the Immigration and Naturalization Service disagrees with the Department of State's decision. And, just as the Department of State refused to implement its decision here because of the request of the Immigration and Naturalization Service, so there, the Atomic Energy Commission bowed to the General Accounting Office and refused to pay the claims it had approved.

Then, the claimant there, like petitioner here, brought an action to enforce the decision in his favor. The Department of Justice, appearing there for the defendant, as it appeared here for respondents, opposed enforcement of the Atomic Energy Commission's decision on the grounds that it was "not supported by substantial evidence" and was "erroneous as a matter of law". 406 U.S. at 3. In short, the Department of Justice agreed with the General Accounting Office, and disagreed with the Atomic Energy Commission, just as here, the Attorney General and his Department agree with the Immigration and Naturalization Service and disagree with the Department of State.

In reversing a decision of the Court of Claims *against* the plaintiff there, Mr. Justice Douglas said for the Court, 406 U.S. at 10:

> Since the AEC withheld payment solely because of the views of the Comptroller General and since he had been given no authority to function as another tier of administrative review, there was no valid reason for AEC not to settle with petitioner [*i.e.*, the contractor] according to its earlier decision. For that purpose the AEC was the United States.

Then, in conclusion, Mr. Justice Douglas said for the Court, 406 U.S. at 18, 19:

> This case does not involve the situation where an administrative agency, upon timely petition *** or prompt *sua sponte* reconsideration *** determines that its earlier decision was wrong and, for that reason, refuses to abide by it. AEC has not, to this day, repudiated the merits of its decisions ***. ***This is simply an instance where a citizen successfully resolved its disputes with the agency *** to whom that power had been delegated. The fruits of petitioner's labors were frustrated, however, by the intermeddling of another agency without power to act and, when petitioner sought enforcement of its rights in court, still another agency of the Government entered and sought to disavow the decision made here by the AEC.
>
> If the General Accounting Office or the Department of Justice is to be an ombudsman reviewing each and every decision rendered by the coordinate branches of the Government, that mandate should come from Congress ***.

The same holds true here. The Department of State has not to this day, withdrawn the decision of the Board of Appellate Review, or otherwise repudiated its merits.

What was before the State Department's Board of Appellate Review on petitioner's appeal, was a prior administrative (as distinguished from a quasi-judicial) decision of that Department, made while plaintiff was not in the

United States, that the plaintiff had expatriated himself and lost his United States nationality. What the State Department's Board of Appellate Review held, in an adversary, quasi-judicial proceeding, was that the prior administrative holding of the State Department was erroneous, because it found that the alleged expatriating act was *not* voluntary. In these circumstances, there is no warrant in law for the Immigration and Naturalization Service to constitute itself "another tier of administrative review", 406 U.S. at 4, and with or without the concurrence of the Attorney General, to frustrate the State Department's decision that its earlier decision was wrong.

The circumstances of this case demonstrate that the application of *res judicata* to the final decisions of government agencies rendered in adversary, quasi-judicial proceedings, in which the government was represented, and the recognition that there is privity between government agencies for that purpose, are essential not only to enforce repose and to protect persons dealing with the government from repetitive and vexatious proceedings with respect to the same matter, but to protect the government itself from the consequences of the virtual anarchy that must otherwise result.

By abstaining from deciding the first of the questions presented, p. 3, *supra*, the Court below in effect decided it in the negative, and in so doing decided a federal question in a way in conflict with *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940); and *S & E Contractors, Inc. v. United States*, 406 U.S. 1 (1972), applicable decisions of this Court.

2. *In refusing to determine whether §103(a) of the Immigration and Nationality Act of 1952, Tit. 8 U.S.C.*

§1103(a) empowers the Attorney General ex parte to review and overrule, and supersede with his own ex parte decision, the decision of the Board of Appellate Review of the Department of State, and bars the Board's decision from being given res judicata effect in respect of the Attorney General and the respondent Commissioner, his delegate, but nevertheless holding that petitioner's remedy is to relitigate in the courts with the Attorney General, or the respondent Commissioner, the very question heard and determined by the Board, the Court below has decided an important question of federal law which has not been, but should be, settled by this Court.

The Court below recognized that "the case laid before" it "presents broad and important questions concerning the scope of the Attorney General's power to make controlling determinations of law under the Immigration and Naturalization [*sic*] Act, and the applicability of the doctrine of administrative *res judicata* to the prior ruling of the State Department's Board of Appellate Review". *App. A., p. 9a, infra.* After noting that "Neither of these issues is a simple one", the Court below concluded, *App. A., pp. 9a-11a, infra,* that the ruling of the District Court that "the Attorney General's power to render controlling opinions on matters of law was limited to statutory interpretations of prospective and general application, *** and that the Attorney General's opinion did not in any way diminish the effect of the State Department ruling *** is certainly not without force". The Court below, however, then expressed the view that this "result is not *clearly mandated* by either the statute or by the legislative history cited by the District Court". *App. A., p. 11a, infra* [emphasis supplied].

The Court below then proceeded to examine "the broad interpretation of the Attorney General's powers here

offered by *** [the respondent] Commissioner", *App. A., p. 16a, infra,* and concluded, *App. A., p. 11a, infra*:

> The Commissioner's arguments to the contrary are equally problematical. His interpretation of the scope of the Attorney General's power to make controlling determinations of law sweeps broadly. We find particularly troublesome the Commissioner's assertion that the Attorney General's authority to rule on questions of law encompasses the power to determine whether sufficient evidence exists to support a State Department determination of involuntariness in a particular case. While every factual issue perhaps contains an underlying legal determination that a given quantum of facts would enable the factfinder to reach a particular conclusion, acceptance of that rationale in justification of the Attorney General's actions in this case would appear to grant him the power to reconsider and overrule all State Department determinations by a sufficiency of the evidence standard. This would indeed be a unique structure of administrative review, and one would think that Congress might have spelled out more clearly a purpose on its part to encompass it. Cf. *S & E Contractors v. United States,* 406 U.S. 1, 20 (Blackmun, J., concurring).

The resolution of this question, which has not been settled by this Court, involves the construction of §103(a) of the Immigration and Nationality Act, Tit. 8 U.S.C. §1103 (a), in the light of §§104(a), 349(a)(6), and 358 of such Act, Tit. 8 U.S.C. §§1104(a), 1481(a)(6) and 1501. Section 103(a) in pertinent part provides:

> The Attorney General shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens, except insofar as this Act or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however,* That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

It will be observed at the outset, that the same clause expressly excludes, *pari passu,* "the powers, functions and duties conferred upon *the President,* the Secretary of State, the officers of the Department of State, or diplomatic or consular officers", from the authority granted to the Attorney General to administer and enforce the "Act and all other laws relating to the immigration and naturalization of aliens". [Emphasis supplied.] In this circumstance, it is inescapable that whatever authority the Attorney General has under the proviso in respect of "questions of law", must extend to the "powers, functions and duties" of the President, no less than to those of the Secretary of State. But, for the Attorney General to have the same plenary power over the President, and Presidential decisions, as respondent Commissioner here claims he has over the Secretary of State, and decisions of his delegates, would be a monstrous anomaly, not easily to be assumed. The District Court's construction of the proviso is more "sensible", and while possibly not "mandated" by the legislative history, it is clearly indicated by it.

Thus, in reporting the bill which became the Act, H. Rep. 1365, 82d Cong., 2d Sess., [1952] 2 U.S. Cong.

News 1653 at 1687, gives a single example of the exercise by the Attorney General of his authority under the proviso, as follows:

> For example, rulings which may be issued by the Attorney General relating to those provisions of the bill governing the admissibility of aliens will be controlling with respect to a determination of aliens who are admissible and will be binding on the Secretary of State with respect to determinations of whether an alien is eligible for a visa.

This clearly indicates that, as the District Court held, the Attorney General's power under the proviso is to issue interpretations of law of prospective and general application, which will be binding, for example, on the Secretary of State. There is nothing in the legislative history, or in the Act itself, which as much as suggests that the Attorney General has authority *post facto* and *ex parte* to review, overrule and supersede with his own, a decision of the Secretary of State, such as that of the Board of Appellate Review with which this case is concerned. Nor is there anything in the legislative history or the Act itself which as much as suggests that any power, function or duty of the Attorney General precludes such a decision from being binding and conclusive on the Attorney General, and the respondent Commissioner, his delegate, if the conditions for such *res judicata* effect are otherwise present.

Furthermore, it is clear that the determination whether petitioner's formal renunciation before a consular officer abroad was voluntary, and thus effective to expatriate him, *vel non*, is within "the powers, functions and duties of the Secretary of State" under the Act, which are expressly excluded, like the President's, from the Attorney General's

general authority under §103(a) to administer and enforce the Act. Thus, §104(a), Tit. 8 U.S.C. §1104(a) charges the Secretary with "the determination of nationality of a person not in the United States"; §349(a)(6), Tit. 8 U.S.C. §1481(a)(6) provides for loss of citizenship by "making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State", and §358, Tit. 8 U.S.C. §1501 in pertinent part provides:

> Whenever a diplomatic or consular officer of the United States has reason to believe that a person *while in a foreign state* has lost his United States nationality *** he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, *for his information,* and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates. [Emphasis supplied.]

It will be noted that it is only when the Secretary *approves* a consular determination of loss of citizenship, that a copy of the certificate is to be sent to the Attorney General and, then, only "for his information". If the consular determination is *disapproved* by the Secretary, there is no requirement that the Attorney General be informed of it at all. Obviously, if the Attorney General had some review function in the premises, an approved

certificate would be required to be sent to him for more than merely informational purposes, and the Act or the regulations thereunder, would require that the Attorney General be informed in all cases where the Secretary disapproved the consular determination. This, neither the Act, nor any regulation of either department, does.

Here, the consular certificate of loss of citizenship by petitioner was, in the first instance, approved on behalf of the Secretary, but on petitioner's appeal therefrom to the Board of Appellate Review of the Department of State, pursuant to regulations of that Department, 22 CFR §§50.60-50.72, such approval was in effect cancelled and revoked in an adversary, quasi-judicial proceeding in which the government was represented by counsel.

If the Attorney General had any review function in the matter under the Act, his knowledge of the Board's action would not have been a mere happenstance. As it is, the Attorney General, and the respondent Commissioner, his delegate, came into the case "laterally", and only because the State Department had lodged petitioner's certificate of naturalization (surrendered by petitioner to the consular officer when he formally renounced his citizenship) with respondent Commissioner, and petitioner, perforce, asked him to return it. The respondent Commissioner's claim of right to determine the disposition of the certificate of naturalization as "custodian of records relating to naturalization" is not supported by either §358 or §340(h) of the Act, Tit. 8 U.S.C. §§1501 and 1451(h) to which he has pointed in this connection. And the Attorney General himself came into the case, *propria persona,* and "reviewed" the decision of the Board, only at the instance of the respondent Commissioner, his delegate, to resolve "the differences" between him and the Department of State concerning

petitioner. *R.* 47, 77. Nothing in §103 of the Act, Tit. 8 U.S.C. §1103, or elsewhere in the Act clothes the Attorney General with any such power, function or duty.

Certainly, if it had been the intention of Congress to confer on the Attorney General the plenary power *to review* claimed for him, the explanation of §103 in the House Report would have said so, or at least given an example disclosing such intention. Certainly, too, some express provision to that effect would have been included in the detailed specifications of the Attorney General's powers and duties set out in §103(a) of the Act, Tit. 8 U.S.C. §1103(a), following the proviso, and elsewhere in the Act. Thus, for example, §236(b) of the Act, Tit. 8 U.S.C. §1226(b), makes specific provision for appeals to the Attorney General both by the Immigration and Naturalization Service and the individual involved, from orders of special inquiry officers of the Immigration and Naturalization Service made in exclusion proceedings. It is hardly to be supposed that the Congress, which took such care to spell out the authority of the Attorney General to review decisions of his own subordinates, would have left lurking in vague generalities the authority here claimed for the Attorney General to review quasi-judicial decisions of, or by authority of the Secretary of State in adversary, quasi-judicial proceedings in which the government was represented. Certainly, too, if the Congress had intended the Attorney General to have the authority claimed for him, it is not lightly to be supposed that the Act would have been altogether silent, as it is, on such matters, as for example, how, and by whom review by the Attorney General would be initiated, whether the proceedings on review would be adversary or *ex parte,* whether the review would be on the record, or by hearing *de novo,* etc. See, *e.g.,* in contrast, §236(b), Tit. 8 U.S.C. §1226(b); §242(b) Tit. 8 U.S.C. §1252(b).

As it is, not only is the Act silent in all such respects, but so are the regulations of the Attorney General and the Secretary of State. Indeed, not only are there no regulations governing any such proceedings, or prescribing procedures for review by the Attorney General of quasi-judicial decisions of, or under the authority of the Secretary of State, but the regulations of neither the Attorney General nor the Secretary of State as much as mention any such review.

While, as the Court below notes, *App. A., p. 12a, infra,* the Act "is silent on the question of the kind of impact that a State Department determination of this kind should have on other federal agencies", that, clearly, is not the end of the road. The doctrine of administrative *res judicata,* like the older doctrine of judicial *res judicata* from which it derives, stands on its own feet "not only to 'enforce repose', but also to protect the successful party from being vexed with needlessly duplicitous proceedings". *Safir v. Gibson,* 432 F2d 137, 142, 143 (2d Cir. 1970), cert. denied 400 U.S. 850, 942 (1970). The question here is whether §103(a) of the Immigration and Nationality Act, Tit. 8 U.S.C. §1103(a), bars such decision from being binding and conclusive on the Attorney General and the respondent Commissioner, his delegate, and empowers the Attorney General *ex parte* to review, overrule and supersede such decision.

The question is an important one, as the Court of Appeals has explicitly recognized. The State Department through its Board of Appellate Review will continue, in adversary, quasi-judicial proceedings in which the government is represented by counsel, to render final decisions concerning nationality. And so, too, in the same general type of proceeding administrative tribunals of the Depart-

ment of Justice will continue to render final decisions concerning nationality, in both deportation and exclusion cases. Is a decision made in such a contested proceeding to bind, if anyone, only the department which makes it? The present chaos in the administration of the Immigration and Nationality Act, as shown by the "internecine warfare" which this case discloses, must continue until the first three questions presented by this case are decided.

By abstaining from deciding the second and third of the questions presented, *supra*, p. 3, and in holding that petitioner's remedy is to relitigate in the courts the question decided by the Board in an adversary, quasi-judicial proceeding, the Court below in effect decided such questions in the affirmative, and in so doing decided an important federal question which has not been, but should be, settled by this Court.

3. *In refusing to decide the first three questions presented, p. 3, supra, and by instructing the District Court to dismiss the complaint, thus leaving such questions wholly undecided, in effect as nonjusticiable, on the ground that it was "unnecessary and indeed unwise to attempt to resolve" them "in the context of this proceeding", the Court below has deprived the parties of their "day in court" on questions which the Court below has itself characterized as "complex and difficult" and "broad and important questions concerning the scope of the Attorney General's power to make controlling determinations of law" under the Immigration and Nationality Act, and "the applicability of the doctrine of administrative res judicata to the prior ruling of the State Department's Board of Appellate Review". Such abdication of the judicial function by the Court below is prejudicial to both the legitimate rights of petitioner and the national*

public interest, and is such a departure from the accepted and usual course of judicial proceedings, as to call for this Court's intervention.

The grounds given by the Court below for refusing to decide the questions presented by this case, fall into two categories. The first is that it was "unnecessary" for it to do so because petitioner has an "adequate" "alternative" remedy. The second is that it was "unwise" to do so on a miscellany of grounds, including, *inter alia,* that the "federal judiciary should [not] permit the enlistment of its own powers" to "promote *** internecine warfare" between the State and Justice Departments, that to decide the questions either way "would constitute a major change in the present enforcement structure" of immigration and nationality law, would be "destructive of the overall allocation of powers" between such departments, and would constitute "judicial intrusion into the administrative decision-making process.". *App. A., pp. 16a, 17a, 19a, 20a, infra.* See, pp. 12-15, *supra.*

The Court of Appeals aptly characterizes the "alternative" remedy to which it would remit petitioner – an action for a judicial declaration of nationality – as one "for the disposition of the *underlying* dispute in this case", *App. A., p. 16a, infra* [emphasis supplied], that is, whether petitioner's formal renunciation of his citizenship was, or was not a voluntary act of expatriation. Put otherwise, the remedy which the Court below holds to be an "adequate" alternative to a proceeding to have the *res judicata* effect of the Board's decision determined, is to litigate *de novo* the identical question which has already been litigated before the Board, and decided by it, in an adversary, quasi-judicial proceeding in which the government was represented.

Manifestly, however, the "alternative" remedy to which the Court of Appeals would thus remit petitioner, is not

an "adequate" alternative if the decision of the Board is *res judicata,* as petitioner claims, and as the District Court held. *App. B., pp. 21a, 22a, 25a, infra.* See pp. 5-9, 17-26, *supra.* Nor does it become an "adequate" remedy merely because the Court below chose to abstain from deciding the question of *res judicata,* and, in effect, to vacate the District Court's decision in that regard, for reasons wholly apart from the merits. By leaving the question of *res judicata* undecided, and at the same time remitting petitioner to a relitigation of the question that the Board has already decided, the Court below has departed from the accepted and usual course of judicial proceedings, which is not to allow litigation to proceed until claims of *res judicata* have first been determined. Any other course necessarily frustrates and defeats the very purpose of *res judicata.*

The conclusion seems inevitable that the wholly insupportable reason put forward by the Court of Appeals as making it "unnecessary" for it to decide the "complex and difficult" and "broad and important questions" posed by this case, is proffered merely to give some coloration in law to its abstention from deciding questions it considers "unwise to attempt to resolve". *App. A., pp. 9a, 11a, 16a, infra.* And, as already observed, pp. 13-15, *supra,* the reasons given by the Court below for deeming it "unwise" to decide the questions posed by this case, and for leaving them undecided, fall far short of supplying any basis for the abdication by the Court below of its judicial function. Furthermore, the abstention of the Court below sacrifices not only the right of petitioner *not* to have to relitigate the question already determined by the Board, if, as he claims and the District Court held, *res judicata* is applicable, see pp. 5-9, 17, 18, *supra,* but it sacrifices the national public interest in having to put to an end, once and for all, the intolerable "internecine warfare" between the

State and Justice Departments under the Immigration and Nationality Act, in which petitioner has, unfortunately, been caught up.

The questions this case poses of the applicability of *res judicata* to the decision of the Board of Appellate Review, and of the powers of the Attorney General under §103(a) of the Immigration and Nationality Act, Tit. 8 U.S.C. §1103(a) are legitimate questions for the courts to decide, and the Court below should have decided them.

CONCLUSION

Petitioner is hopeful that the respondent Commissioner will recognize that the disposition of this case by the Court below is no more in the national public interest than it is in petitioner's interest – that "the inn that shelters for the night is not the journey's end" – and that the resolution of the questions raised by this case are long overdue. Accordingly, petitioner is hopeful that the respondent will agree with petitioner that

The petition should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1344 — September Term, 1974
Civil 2045-72

Claude Cartier

v.

Secretary of State, et al., Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: McGowan and MacKinnon, Circuit Judges and Christensen,* United States Senior District Judge for the District of Utah

United States Court of Appeals
for the District of Columbia Circuit
FILED OCT 30 1974
HUGH E. KLINE
CLERK

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration of the foregoing, and in accordance with the opinion of this Court filed herein this date, it is

ORDERED AND ADJUDGED by this Court that the motion by the Secretary of State to dismiss his appeal is granted, and the case is remanded to the District Court with instructions to dismiss appellee's petition without prejudice to the renewal of an action in the appropriate forum under the provisions of 8 U.S.C. §1503.

Per Curiam
For the Court

/s/ Hugh E. Kline, Clerk

Date: October 30, 1974

Opinion for the Court filed by Circuit Judge McGowan.

*Sitting by designation pursuant to 28 U.S.C. §294(d)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1344 September Term, 1974
Civil Action No. 2045-72

Claude Cartier

v.

Secretary of State et al.

Appellants

Before: McGowan and MacKinnon, Circuit Judges; Christensen*, U.S. Senior District Judge for the District of Utah.

United States Court of Appeals
for the District of Columbia Circuit
FILED DEC 31 1974
HUGH E. KLINE
CLERK

ORDER

On consideration of appellee's petition for rehearing, it is

ORDERED by the Court that appellee's aforesaid petition is denied.

For the Court:

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

*Sitting by designation pursuant to Title 28 U.S. Code Section 294(d).

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1344

CLAUDE CARTIER

v.

SECRETARY OF STATE, ET AL., APPELLANTS

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 2045-72)

Decided October 30, 1974

Charles Gordon, General Counsel, Immigration and Naturalization Service, Department of Justice, of the bar of the Supreme Court of the United States, *pro hac vice* by special leave of court, with whom *Harold H. Titus, Jr.*, United States Attorney at the time the brief was filed, *John L. Murphy*, Chief, Government Regulations Section, Criminal Division, Department of Justice and *Richard L. Chaifetz*, Attorney, Criminal Division, Department of Justice were on the brief, for appellants. *John A. Terry*, United States Attorney, also entered an appearance for appellants.

Lawrence S. Lesser, with whom *Joseph A. Fanelli* was on the brief, for appellee.

Before MCGOWAN and MACKINNON, *Circuit Judges*, and A. SHERMAN CHRISTENSEN * *United States Senior District Judge for the District of Utah.*

Opinion for the Court filed by *Circuit Judge* MCGOWAN.

MCGOWAN, *Circuit Judge*: Appellee initiated this action under 28 U.S.C. § 1361 for a writ of mandamus to compel appellants Secretary of State and Commissioner of the Immigration and Naturalization Service to take certain actions with respect to his nationality status. The District Court concluded that a determination of the invalidity of appellee's prior renunciation of nationality, made by the Board of Appellate Review of the State Department, was binding upon all agencies of the federal government; and it accordingly ordered appellants to act in conformity with that determination. *Cartier v. Secretary of State*, 356 F. Supp. 460 (D.D.C. 1973). We have concluded that the District Court erred in so exercising its powers as to circumvent the remedy specifically provided by the Immigration and Naturalization Act, and we remand with orders that the action be dismissed without prejudice to the seeking of relief under 8 U.S.C. § 1503.

I

Appellee Claude Cartier, born in Budapest, Hungary, became a naturalized American citizen in 1944 by virtue of his service in the United States Army during World War II. 8 U.S.C. § 1439. At that time, the naturalizing court issued him a certificate of naturalization to evidence this status.

In January of 1964, appellee formally renounced his citizenship before the United States Consulate in Bern,

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* Sitting by designation pursuant to Title 28, U.S. Code § 294(d).

Switzerland, and, upon request, surrendered his certificate of naturalization. Following the Secretary of State's approval of the certificate of loss of nationality executed by the U.S. Consul in Switzerland, *id.*, § 1481, the State Department forwarded to the Department of Justice a copy of the certificate of loss and the surrendered certificate of naturalization.

In 1972 appellee filed a petition for appeal with the State Department's Board of Appellate Review, attempting to nullify his prior renunciation. In proceedings in which the State Department's Passport Office appeared in opposition, appellee presented his version of the events leading to his renunciation, and urged that his action had been an involuntary one thrust upon him by the confluence of events in his personal life.

Appellee's description of these events painted a sympathetic picture of a man who considered himself caught between his desire to remain in Europe to care for his children and his fear that a period of prolonged foreign residence would lead to the loss of his American citizenship. In 1963 appellee's wife filed for divorce and obtained the temporary custody of their two children. Mrs. Cartier was at the time living in Paris, and appellee moved to Europe in order to be near his children, whom he felt to be suffering from parental neglect. Appellee recognized that his foreign residence might pose a threat to his American citizenship, for the reason that Section 352(a) of the Immigration and Nationality Act, 8 U.S.C. § 1484(a), then provided that certain naturalized citizens would lose their citizenship by remaining abroad for a period of three years. Appellee testified that he viewed with apprehension the difficult posture of being motivated, on the one hand, by his desire to remain abroad to care for his children and, on the other, by his knowledge that protracted foreign residence threatened his citizenship status.

Appellee resolved to extricate himself from the horns of this dilemma by excising one of the horns. Thus, after some consideration, and taking into account the cautionary advice of a State Department official that Section 352(a) was then under challenge in the Supreme Court, appellee determined to renounce his citizenship rather than suffer the humiliation of having it taken from him by operation of law.[1]

While not challenging the essence of appellee's relation of the factual events, the Passport Office questioned the sincerity of his perception of the dilemma. It pointed to a number of less drastic means by which appellee could have resolved his problem, and asserted that the failure to pursue these alternatives illustrated that Cartier was really under no compulsion to renounce. The Passport Office characterized his action as a shortsighted but voluntary one that he had later come to regret.

The Board of Appellate Review was, however, persuaded by appellee's description of his emotional stress. It concluded that the renunciation was prompted by a "duress of devotion" to his children, and was thus, in legal contemplation, involuntary. Accordingly, the Board held, by reference to the Supreme Court's decision in *Afroyim v. Rusk*, 387 U.S. 253 (1967), that the 1964 renunciation was not an operative act of expatriation.

Having won what he considered to be an affirmation of his status as an American citizen, appellee petitioned the Department of State for a passport and for the return of the certificate of naturalization he had surrendered pursuant to the 1964 renunciation. Appellee was in-

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[1] Appellee stated that he considered the possibility that the Supreme Court would invalidate Section 352(a) to be remote. However, that is precisely what the Court did do some four months following appellee's renunciation. Schneider v. Rusk, 377 U.S. 963 (1964).

formed, however, that the State Department had long ago sent his certificate to the Immigration and Naturalization Service of the Department of Justice (INS), and that he would have to seek its return from that agency.

INS refused to return the certificate, stating that it disagreed with the Board of Appellate Review. Thereafter, the State Department's Passport Office informed appellee that it would not issue a passport until the question of the effect of his 1964 renunciation was clarified, and appellee turned to the courts for relief.

Appellee sought mandamus in the United States District Court, seeking to compel the State Department to issue him a passport and INS to return his certificate of naturalization. Shortly after the initiation of this litigation, INS referred the "administrative conflict" to the Attorney General for his resolution.

In its cross-motions for dismissal or for summary judgment, the Government represented that the entire matter had been submitted to the Attorney General and suggested that any judicial ruling prior to the Attorney General's decision would be premature. Shortly thereafter the Attorney General issued an opinion purporting to overrule the State Department. *In re Citizenship Determination: Claude Cartier* (Feb. 7, 1973), JA 77.

The District Court, characterizing the case as a suit to declare a State Department determination of citizenship binding on all officers and agencies of the United States, felt that the primary question was whether the Attorney General is empowered to overrule State Department determinations of nationality. A related question, in the court's opinion, was whether the quasi-judicial decision of the State Department's Board of Appellate Review was binding on all agencies of the federal government. *Cartier, supra*, at 462. Concluding that the Attorney General lacked such power and that the State

Department ruling was *res judicata* for all federal agencies, the court issued an order prohibiting the Secretary from refusing to issue appellee's passport on the ground that he had expatriated himself. The court additionally prohibited the Commissioner of INS from withholding appellee's certificate of naturalization or otherwise impeding the issuance of his passport on grounds of expatriation. The Justice Department thereafter brought this appeal on behalf of both the Commissioner and the Secretary of State.

Appellants' initial brief in this court suggested that the State Department had taken the somewhat perplexing position of urging that its Board of Appellate Review was without jurisdiction to render a decision and that the Board of Review panel that decided the case was improperly constituted. This mystery was subsequently resolved, however, when the Secretary of State obtained the Solicitor General's permission to file his own brief and then moved to be dismissed as a party appellant, asserting that he agreed with the District Court's ruling and that he had fully complied with it.

This court first heard argument on the Secretary's motion for dismissal. At that time, State Department counsel for the Secretary of State informed the court that the Secretary disagreed with the positions advanced on his behalf by the Department of Justice in the District Court and in this court, and disavowed in their entirety the positions urged on his behalf on appeal.[2]

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[2] This curious situation derives from the fact that 28 U.S.C. §§ 516 and 519 denominate the officers of the Department of Justice to represent the United States or agencies or officers thereof in the conduct of litigation. In this case, it appears that the Justice Department determined that the views of the Attorney General and the Commissioner were correct, and, notwithstanding State Department disagreement, represented those positions as the views of both the Secretary and the Commissioner. The Secretary of State stood by silently in the

Neither counsel for appellant Commissioner nor appellee opposed the Secretary's motion, but we deferred ruling on that question pending receipt of the parties' supplemental memoranda. Both the Commissioner and appellee have again indicated that they do not oppose the Secretary's dismissal as an appellant, and we so order.

II

The parties on appeal essentially have adopted the District Court's view of the controlling questions of law, and thus have devoted most of their efforts to supporting or refuting the District Court's opinion. Thus, the case laid before this court presents broad and important questions concerning the scope of the Attorney General's power to make controlling determinations of law under the Immigration and Naturalization Act, and the applicability of the doctrine of administrative *res judicata* to the prior ruling of the State Department's Board of Appellate Review.

Neither of these issues is a simple one. The Immigration and Naturalization Act denominates the Attorney General as the principal federal officer in charge of

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District Court and nonetheless saw his true position vindicated. After having been enlisted to attempt to reverse his "loss" in the District Court, the Secretary took steps to make his position known to this court.

Both the Secretary and appellee have questioned whether Sections 516 and 519 authorize the Attorney General to impose his view upon another federal agency in the course of his representation of that agency. Our determination to grant the Secretary's unopposed motion for dismissal moots this question.

After hearing argument on his motion to be dismissed as an appellant, this court requested that the Secretary of State provide us his views on the merits of the appeal. The Secretary has complied with that request, and his view of the governing law corresponds generally with that of appellee Cartier.

immigration and nationality laws within the United States. Section 103(a) of the Act states, in relevant part:

> The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the . . . Secretary of State . . . .

8 U.S.C. § 1103(a).

Section 104(a) of the Act, in turn, provides that the Secretary of State "shall be charged with the administration and enforcement of the provisions of this chapter and all other immigration and nationality laws relating to . . . the determination of nationality of a person not in the United States." 8 U.S.C. § 1104(a). Finally, the Act provides that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." *Id.* § 1103(a).

Reviewing the State Department determination, the Attorney General concluded that the Board's decision would not bind the Attorney General on questions of law or fact in light of his plenary authority over the issues involved in the case. Additionally, he determined that the opinion of the Board of Appellate Review had no operative effect because the Board lacked a proper quorum at the time it rendered its decision. The Attorney General finally determined that appellee had failed to overcome the presumption that his act of expatriation was voluntary and that, as a matter of law, appellee's allegations of conflicting loyalties were insufficient to support a claim that the renunciation was the product of duress. *In re Citizenship Determination: Claude Cartier,* (Feb. 7, 1973), JA at 77.

The District Court ruled that the Attorney General's power to render controlling opinions on matters of law

was limited to statutory interpretations of prospective and general application, and thus concluded that the Attorney General's opinion did not in any way diminish the effect of the State Department ruling. That position is certainly not without force. However, the result is not clearly mandated either by the statute or by the legislative history cited by the District Court. The Commissioner's arguments to the contrary are equally problematical. His interpretation of the scope of the Attorney General's power to make controlling determinations of law sweeps broadly. We find particularly troublesome the Commissioner's assertion that the Attorney General's authority to rule on questions of law encompasses the power to determine whether sufficient evidence exists to support a State Department determination of involuntariness in a particular case. While every factual issue perhaps contains an underlying legal determination that a given quantum of facts would enable the factfinder to reach a particular conclusion, acceptance of that rationale in justification of the Attorney General's actions in this case would appear to grant him the power to reconsider and overrule all State Department determinations by a sufficiency of the evidence standard. This would indeed be a unique structure of administrative review, and one would think that Congress might have spelled out more clearly a purpose on its part to encompass it. *Cf. S & E Contractors v. United States*, 406 U.S. 1, 20 (Blackmun, J., concurring).

The question of the applicability of the doctrine of administrative *res judicata* to determinations made pursuant to the Immigration and Nationality Act is likewise a complex and difficult question. While the doctrine of administrative *res judicata* has in recent years found increasing acceptance in some areas of administrative law,[3] it has not evolved into a rigid system that is to be

[3] The progress of judicial acceptance of the doctrine of administrative *res judicata* can be seen by examination of the

blindly applied in every context. As Professor Davis recently observed, "[t]he sound view is . . . to use the doctrine of res judicata when the reasons for it are present in full force, to modify it when modification is needed, and to reject it when the reasons against it outweigh those in its favor." K. DAVIS, ADMINISTRATIVE LAW TEXT, § 18.02, at 360 (1973). This view has obtained support in the case law. *See, e.g., United States v. Smith*, 482 F.2d 1120, 1123 (8th Cir. 1973); *Tipler v. E. I. duPont de Nemours & Co.*, 443 F.2d 125, 128 (6th Cir., 1971); *cf. Title of Immigration and Naturalization Service*, 322 F.2d 21, 25, n. 11.

The Immigration and Nationality Act is silent on the question of the kind of impact that a State Department determination of this kind should have on other federal agencies charged with administration of the Act. As previously noted, the Act vests in the Attorney General the primary responsibility for enforcement of the immigration and nationality laws in the United States, and

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writings of Professor Kenneth Culp Davis. In 1958, Professor Davis devoted considerable effort to demonstrating the unsoundness of judicial statements refusing to apply the doctrine of *res judicata* to administrative proceedings. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 18.02, at 548-557 (1958). By 1973 the applicability of *res judicata* to certain administrative proceedings had become an accepted principle of federal law as well as an increasingly accepted notion in the state courts, and Professor Davis no longer felt compelled to defend the validity of the general proposition with such vigor. K. DAVIS, ADMINISTRATIVE LAW TEXT, § 18.02, at 360 (1972).

It would appear that the rapid sweep of the law may have left the Commissioner behind. The cases that he cites in support of his argument that *res judicata* is ordinarily inapplicable to administrative determinations have been largely discredited by the Supreme Court. *See* United States v. Utah Construction & Mining Co., 384 U.S. 394, 421, 422, n. 19, n. 21 (1966).

the Secretary of State is charged with similar responsibilities in relation to nationality determinations of persons not in the United States.

It is apparent from the bifurcation of responsibilities that each agency will be called upon to address similar issues in different contexts. For example, the State Department's issuance of a passport must reflect its determination that the recipient is a national of the United States.[4] However, INS must decide whether a person presenting himself at the border is entitled to entry. Since the statute only authorizes exclusion of aliens, 8 U.S.C. § 1226, which it defines as persons who are neither citizens or nationals of the United States, *id.* § 1101 (3), an INS decision to exclude an alien must in some cases reflect disagreement with the prior State Department determination of nationality. In this context, the initial State Department determination of nationality required for the issuance of a passport has not been held to preclude an independent INS assessment of the matter. *See Yee v. Barber*, 210 F.2d 613 (9th Cir.), *cert. denied*, 347 U.S. 988 (1954); *In re Wing*, 124 F. Supp. 492 (N.D.Cal. 1954).

Similar administrative disagreement over the question of nationality has arisen in the context of deportation proceedings, and again a prior State Department decision has not barred the INS's exercise of independent judgment on the question of nationality. Thus in *Montana v. Rogers*, 278 F.2d 68 (7th Cir. 1960), *aff'd*, 366 U.S. 308 (1961), the court of appeals concluded that a

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[4] 22 U.S.C. § 212 provides that passports shall issue only to "those owing allegiance, whether citizens or not, to the United States." The Attorney General has interpreted allegiance to mean *permanent* allegiance, 26 Op. Atty. Gen. 376 (1907), and thus the State Department determination in issuing a passport is the equivalent of decision that the recipient is a "national of the United States." 8 U.S.C. § 1101(22).

prior State Department indication of nationality and the INS's acquiescence in that determination by admitting appellant into the United States did not preclude subsequent deportation proceedings upon INS's realization that the earlier nationality determination had been erroneous.

Neither has the State Department always considered itself bound by a previous INS determination of nationality. For example, the controversy that led to litigation in *Lung v. Dulles*, 261 F.2d 719 (9th Cir. 1954), occurred when the State Department refused to issue a passport on the basis of its independent conclusion of non-nationality, notwithstanding a prior favorable ruling on that issue made by INS in connection with an inquiry over admissibility into the country.[5]

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[5] The position taken by the Attorney General in *In re Flegemheimer*, 41 Op. Atty. Gen. 452 (1960), would appear to preclude the recurrence of this type of case. There the State Department, feeling that a prior INS determination of citizenship and grant of a certificate of citizenship was erroneous, chose to take its position to the Attorney General rather than to refuse to issue a passport on the basis of its own determination of non-nationality. It requested the Attorney General to compel INS to initiate proceedings for cancellation of the certificate.

Interestingly, the Attorney General's opinion was that the INS issuance of the certificate of citizenship compelled State to consider Flegemheimer a citizen. In parts of his opinion, the Attorney General speaks in general terms of the applicability of administrative *res judicata*. *See id.* at 460. However, the opinion primarily rests on Section 332(e) of the Immigration and Nationality Act of 1952, which states that in all public offices of the United States a certification of citizenship should have the same effect as a certificate of naturalization issued by a court. 8 U.S.C. § 1443(e). This, in the opinion of the Attorney General, precluded collateral administrative inquiry into the facts underlying the issuance of the administrative document, except in a Justice Department proceeding to revoke the certificate.

The cited cases were decided prior to the general judicial acceptance of the applicability of *res judicata* to administrative proceedings, and thus cannot be considered definitive statements of the issue. However, the cases do serve to illustrate that both the Department of State and INS have felt at liberty to make independent nationality determinations in instances in which the exercise of their statutory responsibilities requires a judgment on that question. This pattern generally seems to support characterizations of the immigration and naturalization system as a "double check" system in which important issues of nationality might be considered in more than one forum. *See* Besterman, "Commentary on the Immigration and Nationality Act," 8 U.S.C.A. (1953 ed.) 1, at 46.*

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* As the legislative history of the Immigration and Nationality Act reveals, Congress was aware of the possible confusion and hardship that could result from the multiplicity of control, but concluded that that was an acceptable price to pay for effective control of alien admissions:

> Among the principal points of criticism aimed at the immigration structure has been the contention that the multiplicity of control by several agencies of various immigration activities should be eliminated. In general, the subcommittee has come to the conclusion that, although there are some points in the mechanism where coordinated action is necessary and duplication must be eliminated, the over-all structural pattern ought to be maintained. The subcommittee is persuaded to the position on the grounds that (1) the distribution of responsibility places additional barriers in the way of undesirable aliens, additional fences of protection which the alien must surmount, and (2) the present system operates satisfactorily and the suggested modifications will eliminate most of the existing difficulties.

S. REP. No. 1515, 81st Cong., 2d Sess., 332 (1950). The Special Subcommittee to Investigate Immigration and Naturalization, author of the report, considered and rejected a proposal advanced by the Hoover Commission to transfer the Visa Division of the Department of State to the Justice De-

III

Apart from the difficulty these issues present conceptually, their resolution could have a most significant impact on the administration of the immigration and nationality laws. The District Court's holding that the State Department determination of nationality binds other federal agencies would constitute a major change in the present enforcement structure of this body of law, as would endorsement of the broad interpretation of the Attorney General's powers here offered by appellant Commissioner. We find it unnecessary and indeed unwise to attempt to resolve these questions in the context of this proceeding, for a much more sensible statutory remedy exists for the disposition of the underlying dispute in this case. That procedure is the action for a judicial declaration of nationality.

Section 360 of the Immigration and Nationality Act provides that any person within the United States who is denied a right or privilege of nationality by any

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partment in order more effectively to centralize control. The subcommittee decided to recommend continuation of the bifurcation of power to maintain "an additional barrier to the entry of inadmissible aliens," *id.* at 327, 331, feeling that most of the problems presented by the dual system could be corrected by improving the consular officers' knowledge of the standards applied by INS, *id.* at 333. Moreover, the subcommittee considered the problem of the issuance of passports to be closely related to those presented in the issuance of visas. *Id.* at 331.

Senator McCarran introduced a bill reflecting these views in the 81st Congress, but the measure was committed for further study. The 82nd Congress thereafter drew upon the previous experience in enacting its sweeping reform of the immigration and naturalization laws. *See* H. REP. NO. 1365, 82nd Cong., 2d Sess., 27 (1952). Among the ideas expressed by the Senate report that carried over into the 1952 legislation is the desire to provide more thorough screening of aliens. *Id.* at 52.

United States department can initiate an action under 28 U.S.C. § 2201 for a judicial declaration of nationality.[7] Certainly the actions of the Commissioner sufficed to warrant appellee's invocation of this remedy. He chose instead to seek to compel the return of his certificate of naturalization by resort to writ of mandamus—an extraordinary judicial remedy at best—consistently maintaining that he was not seeking a judicial determination of nationality.

A realistic appraisal of the District Court's ruling on the *res judicata* effect of the Board of Appellate Review's determination suggests that appellee did in fact win the essential equivalent of a judicial declaration of nationality, for the rationale of the District Court opinion seems to preclude any administrative action that reflects disagreement with the Board's determination of the invalidity of appellee's renunciation. Rather than obtaining a positive judicial ruling on the question of his nationality, appellee seems to have won a judicial prohibition against administrative assertion of non-nationality. The Attorney General and the Commissioner, in an obvious attempt to avoid circumscription of INS's authority over immigration matters, have advanced arguments that appear to place the Attorney General in a position of exercising appellate review over the Department of State.

Congress, in determining to perpetuate the double check system in the administration of the immigration and nationality laws, *see* note 6, *supra*, obviously did not intend to promote such internecine warfare. Nor do we think that the federal judiciary should permit the enlistment of its own powers to that end when a more appropriate statutory alternative exists.

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[7] The Supreme Court's decision in Rusk v. Cort, 369 U.S. 367 (1962), makes this remedy equally available to persons not within the United States.

Mandamus is an extraordinary remedy to be utilized only in the clearest and most compelling cases. The exercise of the power of mandamus is a matter committed to the sound discretion of the court, *Whitehouse v. Illinois Cent. R. Co.*, 349 U.S. 366 (1955), and the remedy is to be restricted to exigent circumstances.* One critical consideration in determining the propriety of resort to a writ of mandamus is the question of alternative remedies; the writ is usually denied when such alternatives exist. *Ex Parte Republic of Peru*, 318 U.S. 578, 584 (1943). Moreover, the alternative remedies that might call for refusal to resort to writ of mandamus encompass judicial remedies, *Carter v. Seamans*, 411 F.2d 767 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1970); *Whittier v. Emmet*, 281 F.2d 24, 28 (D.C. Cir. 1960),

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* This court summarized the basic principles governing the availability of the writ of mandamus as follows:

> (1) The writ should be used only when the duty of the officer to act is clearly established and plainly defined and the obligation to act is peremptory. (2) The presumption of validity attends official action, and the burden of proof to the contrary is upon one who challenges the action. (3) Courts have no general supervisory powers over the executive branches or over their officers, which may be invoked by writ of mandamus. Interference of the courts with the performance of the ordinary duties of the executive departments of the governments of the government would be productive of nothing but mischief. (4) When the performance of official duty requires an interpretation of the law which governs that performance, the interpretation placed by the officer upon the law will not be interfered with, certainly, unless it is clearly wrong and the official action arbitrary and capricious. (5) For it is only in clear cases of illegality of action that courts will intervene to displace the judgments of administrative officers or bodies. (6) Generally speaking, when an administrative remedy is available it must first be exhausted before judicial relief can be obtained, by writ of mandamus or otherwise.

Hammond v. Hull, 131 F.2d 23, 25 (1942), *cert. denied*, 318 U.S. 777 (1943) [citations omitted].

cert. denied, 364 U.S. 935 (1961); *Clark v. Memolo*, 174 F.2d 978, 980 (D.C. Cir. 1949), as well as administrative ones, *Beale v. Blount*, 461 F.2d 1133 (5th Cir. 1972); *Tarlton v. Clark*, 441 F.2d 384 (5th Cir.), *cert. denied*, 403 U.S. 934 (1971); *Bolger v. Marshall*, 193 F.2d 37 (D.C. Cir. 1951).

In the instant case the alternative of a judicial declaration of nationality under 8 U.S.C. § 1503 is more than adequate to provide appellee all the relief he has sought by mandamus. Moreover, this statutory remedy can respond to appellee's grievances in a manner potentially less destructive of the overall allocation of powers between the Department of State and INS. Indeed, examination of the structure of the Act suggests that the statutory remedy was intended for cases of precisely this kind. Mandamus, therefore, is not an appropriate remedy in this case.

Nor do we think that the problem of remedies can be avoided by characterizing the District Court opinion as a form of declaratory relief rather than mandamus.[9] Although the existence of alternative forms of relief is not an automatic bar to the award of declaratory relief, *see Powell v. McCormack*, 395 U.S. 486, 517-18 (1969), the court, in the exercise of discretion, can refuse to

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[9] Although the action was brought as a petition for writ of mandamus, the District Court characterized the case as an action to declare the State Department determination binding on all federal agencies and combined a ruling to that effect with orders running against appellant Commissioner and against the Secretary of State. Appellee responded to appellant's assertion that mandamus was inappropriate simply by stating that it was not granted, and thus that that was not an issue on appeal.

Examination of the District Court opinion does not indicate whether it consciously abandoned mandamus for another form of relief. Our disposition makes it unnecessary to resolve that question.

grant declaratory relief if alternative remedies are better or more effective. *Cunningham Bros. Inc. v. Bail*, 407 F.2d 1165 (7th Cir.), *cert. denied*, 395 U.S. 959 (1969); *Davis v. Board of Parole*, 306 F.2d 801 (D.C. Cir. 1962); *Gordon v. Matthews*, 273 F.2d 525 (D.C. Cir. 1959), *cert. denied sub nom, Frazier v. United States*, 363 U.S. 813 (1960). The very same factors that indicate the impropriety of resort to mandamus reveal that the District Court should not entertain the type of action for declaratory relief that appellee claims was here granted.[10]

We thus conclude that the District Court erred in proceeding with the action in the manner here presented. The Immigration and Nationality Act provides a specific form of relief for persons claiming to have been improperly denied rights owed them as nationals of the United States—one that can both afford aggrieved persons total relief and at the same time minimize judicial intrusion into the administrative decision-making processes. The District Court's provision of an alternative path to the same goal was erroneous.

The motion by the Secretary of State to dismiss his appeal is granted, and the case is remanded to the District Court with instructions to dismiss appellee's petition without prejudice to the renewal of an action in the appropriate forum under the provisions of 8 U.S.C. § 1503.

It is so ordered.

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[10] Since the Secretary of State, by his own motion and with the consent of all parties, has withdrawn as an appellant in this case, we find it unnecessary to consider whether either mandamus or declaratory relief would be a permissible alternative remedy when one branch of the State Department refused to comply with a ruling issued by another branch of that same agency.

APPENDIX B

FILED
3/9/73
JAMES F. DAVEY
CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CLAUDE CARTIER,	)	
Plaintiff	)	Civil Action
v.	)	No. 2045-72
SECRETARY OF STATE	)	
COMMISSIONER OF IMMIGRATION AND NATURALIZATION	)	
Defendants	)	

MEMORANDUM OPINION AND ORDER

This is a suit to declare a determination of citizenship rights by the U.S. Department of State binding on all officers and agencies of the United States government. The citizenship determination, made by the Board of Appellate Review of the Department of State, was disputed by the Immigration and Naturalization Service, resulting in the withholding of Plaintiff's passport and Certificate of Naturalization, and Plaintiff brought this suit. Subsequently the Attorney General entered this case to resolve the conflict between the two agencies, and issued an opinion declaring that Cartier was not a citizen.

This case is submitted on cross motions for summary judgment and the material facts are undisputed. The primary issue is whether the Attorney General has the authority to review and to overrule the decision of the Department of State with respect to nationality. A corollary issue is whether a quasi-judicial decision of the Board, rendered in an adversary proceeding in which the government was represented, is binding and conclusive on all

officers and agencies of the United States. For the reasons set forth below, this Court holds that the Attorney General does not have the authority to review or to overrule the decision of the Department of State and that the decision is binding and conclusive on all administrative agencies and officers of the United States government.

By statute, the Department of State has the exclusive authority to administer and enforce all nationality laws relating to a person not in the United States. The Immigration and Nationality Act, 66 Stat. 163, as amended, 8 U.S.C. 1104(a)1. Administrative regulations provide an appeal from a holding of loss of nationality, 22 C.F.R. 50. 60, to an appellate board, 22 C.F.R. 7, through an adversary proceeding, 22 C.F.R. 50.61-50.72, which results in a final disposition of a case.

Yet the Attorney General maintains that he may ignore the Board's decision since in this case the Board was improperly constituted, acted on an untimely appeal, and lacked jurisdiction over Cartier because he was in the United States at the time of appeal. This Court holds that the Board had jurisdiction over the appeal, jurisdiction having attached at the time the Certificate of Loss of Nationality was issued, 8 U.S.C. 1104(a)3, and in any case the failure of government counsel to raise these objections at the proceeding constitutes a waiver. Even if colorable, these minor technicalities could hardly support the Attorney General's claim to such a broad and unfettered power. If the Board's decision were defective, an appeal would not logically lie with the Attorney General whose authority extends to the naturalization of aliens and does not include nationality. 8 U.S.C. 1103(a). Yet the Attorney General, relying on Section 103 of the Act, which provides that his decisions on all questions of law

are controlling, maintains that he does have the power to decide this case, and furthermore, that his decision is final and conclusive on the Executive Branch. Immigration and Nationality Act, *supra,* Section 103, 8 U.S.C. 1103(a). As interpreted in its legislative history, the power to decide questions of law extends only to statutory interpretations of prospective and general application. H.Rep.No. 1365, U.S. Code, Cong. and Admin. News, 82nd Cong. Vol. 2 (1952) 1653 at 1687. The issues of "voluntariness," presented in Cartier's case, is a question of fact, *Baumgartner v U.S.,* 332 U.S. 665 (1972) *Soccodato v Dulles,* 226 F.2d 243 (D.C.Cir., 1955), involving the credibility of witnesses and established only by clear, unequivocal and convincing evidence. *Schneiderman v. U.S.,* 320 U.S. 118 (1942).

In addition to recounting detailed facts of Cartier's case in his opinion, and without the benefit of witnesses, cross examination or other elements of an adversary proceeding, the Attorney General made the findings that there was insufficient evidence to overcome the statutory presumption of "voluntariness," or to support the finding of "duress," and that Cartier had voluntarily renounced his citizenship. However, couching these issues as legal does not make them so. They are factual matters.

The Attorney General has never before attempted an appellate review over a quasi-judicial decision of the Board of Appellate Review of the Department of State, acting pursuant to its authority, and pursuant to adversary proceedings in which the government was represented, and this Court finds no such power in the statute. Furthermore, the Attorney General's posture as a reviewing forum poses serious questions of constitutional due process as a "citizen has the right to expect fair dealing from his gov-

ernment . . . and this entails . . . treating the government as a unit rather than as an amalgam of separate entities." *S and E Contractors v United States*, 406 U.S. at 10 (1972). Cartier's treatment here, having once successfully had his rights determined by an agency to whom that power had been delegated, then being subjected to disavowal of those rights by an agency without the power to act, and finally, when he sought enforcement of those rights in court, being blocked by yet another agency without the power to act, strongly suggests a violation of due process.

Accordingly, plaintiff's motion for summary judgment will be granted, and defendants' motion for summary judgment will be denied.

/s/ Jno. Lewis Smith, Jr.
United States District Judge

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[Caption omitted in printing]

* * * * *

~~[Dated March 8, 1973]~~

ORDER

Upon consideration of the Plaintiff's Motion for Summary Judgment, memorandum of points and authorities and attachments in support thereof, and of Defendants' Motion for Summary Judgment memorandum of points and authorities and attachments in support thereof, and oral argument of counsel having been heard, it is this 8th day of March, 1973

ORDERED AND DECLARED that the decision of the Board of Appellate Review of the Department of State is binding and conclusive on all administrative agencies and officers of the United States, and it is further

ORDERED that the Secretary of the Department of State may not refuse to issue Plaintiff's passport on the grounds that he has expatriated himself and has lost his United States citizenship, and it is further

ORDERED that the Commissioner of Immigration and Naturalization may not refuse to return Plaintiff's Certificate of Naturalization, or otherwise obstruct the issuance of his passport, on the grounds Plaintiff has expatriated himself and has lost his United States citizenship.

/s/ Jno. Lewis Smith, Jr.

United States District Judge

APPENDIX C

Immigration and Nationality Act of 1952

POWERS AND DUTIES OF THE ATTORNEY GENERAL AND THE COMMISSIONER

Tit. 8 U.S.C. §1103(a)

SEC. 103. (a) The Attorney General shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens, except insofar as this Act or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however,* That determination and ruling by the Attorney General with respect to all questions of law shall be controlling. He shall have control, direction, and supervision of all employees and of all the files and records of the Service. He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act. He is authorized, in accordance with the civil-service laws and regulations and the Classification Act of 1949, to appoint such employees of the Service as he deems necessary, and to delegate to them or to any officer or employee of the Department of Justice in his discretion any of the duties and powers imposed upon him in this Act; he may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon any other employee of the Service. He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and

shall, in his discretion, appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper. He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon officers or employees of the Service. He may, with the concurrence of the Secretary of State, establish offices of the Service in foreign countries; and, after consultation with the Secretary of State, he may, whenever in his judgment such action may be necessary to accomplish the purposes of this Act, detail employees of the Service for duty in foreign countries.

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POWERS AND DUTIES OF THE SECRETARY OF STATE; BUREAU OF SECURITY AND CONSULAR AFFAIRS

Tit. 8 U.S.C. §1104(a)

SEC. 104. (a) The Secretary of State shall be charged with the administration and the enforcement of the provisions of this Act and all other immigration and nationality laws relation to (1) the powers, duties and functions of diplomatic and consular officers of the United States, except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas; (2) the powers, duties and functions of the Bureau of Security and Consular Affairs; and (3) the determination of nationality of a person not in the United States. He shall establish such regulations; prescribe such forms of reports, entries and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out such provisions. He is authorized to confer

or impose upon any employee of the United States, with the consent of the head of the department or independent establishment under whose jurisdiction the employee is serving, any of the powers, functions, or duties conferred or imposed by this Act or regulations issued thereunder upon officers or employees of the Department of State or of the American Foreign Service.

* * * * *

LOSS OF NATIONALITY BY NATIVE-BORN OR NATURALIZED CITIZEN

Tit. 8 U.S.C. §1481(a)(6)

SEC. 349. [a] From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—

* * * * *

(6) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

* * * * *

CERTIFICATE OF DIPLOMATIC OR CONSULAR OFFICER OF THE UNITED STATES AS TO LOSS OF AMERICAN NATIONALITY UNDER CHAPTER IV, NATIONALITY ACT OF 1940, OR UNDER CHAPTER 3 OF THIS TITLE

Tit. 8 U.S.C. §1501

SEC. 358. Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality under any provision of chapter 3 of this title, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shall certify the facts upon which such belief

is based to the Department of State, in writing, under regulations prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, for his information, and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates.

PROCEEDINGS FOR DECLARATION OF UNITED STATES NATIONALITY IN THE EVENT OF DENIAL OF RIGHTS AND PRIVILEGES AS NATIONAL

Tit. 8 U.S.C. §1503

SEC. 360. (a) If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of or in connection with any exclusion proceeding under the provisions of this or any other act, or (2) is in issue in any such exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims

a residence, and jurisdiction over such officials in such cases is hereby conferred upon those courts.

* * * * *

Tit. 28 U.S.C.

§ 1361. Action to compel an officer of the United States to perform his duty.

The district courts shall have original jurisidiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

§ 2201. Creation of remedy

In a case of actualy controversey within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

APPENDIX D

Federal Rules of Civil Procedure

Rule 8.

GENERAL RULES OF PLEADING

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

* * * * *

Rule 54.

JUDGMENTS; COSTS

* * * * *

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

* * * * *

APPENDIX E

Regulations of the Department of State
22 CFR

§ 7.1 Establishment of Board of Appellate Review; purpose.

There is hereby established the Board of Appellate Review in the Office of the Deputy Under Secretary for Administration for the purpose of promoting centralization of administrative appeal procedures required by law and regulation or otherwise as provided by the Department.

§ 7.2 Board membership.

The Board shall consist of regular members who shall serve on a full-time basis, one of whom shall be designated the head thereof, and such ad hoc members as may be designated from time to time by the Deputy Under Secretary for Administration. Nothing in this section shall prohibit the designation of ad hoc members from among persons not employed by the Department or its Foreign Service.

§ 7.3 Jurisdiction.

The jurisdiction of the Board shall include appeals from decisions in the following cases:

(a) *Nationality cases.* The Board shall consider and determine appeals under § 50.60 of this title. The Board may adopt and make public rules of procedure approved by the Secretary (Part 50, Subpart D of this title).

(b) *Passport cases.* (1) The Board shall consider and determine appeals under § 51.90 of this title. The Board may adopt and make public rules of procedure approved by the Secretary (Part 51, Subpart F of this title).

(2) The Board shall have responsibility for providing a regular or ad hoc member to act in the capacity of hearing officer under § 51.83 of this title.

(c) *Contract cases.* The Board may, as directed by the Deputy Under Secretary for Administration, consider and determine appeals of contractors or grantees from final decisions of contracting officers arising under contracts or grants of the Department of State. This part shall not apply to contract appellate functions otherwise provided for in Department of State Procurement Regulations, 41 CFR Parts 6–60.

(d) *Personnel cases.* (1) The Board shall have responsibility for providing a regular or ad hoc member to act in the capacity of hearing officer under section 1844.2 Volume 3, Foreign Affairs Manual (3 FAM 1844.2) in cases involving appeals from adverse decisions provided for in 3 FAM 1840.

(2) The Board shall make available, upon request of the Board of the Foreign Service under 3 FAM 764.2, regular and ad hoc members of the Board for designation as panel members for the purpose of taking testimony and making findings in cases involving the separation for cause of a Foreign Service officer or employee.

Subpart D–Procedures for Review of Loss of Nationality.

§ 50.60 Appeal by nationality claimant.

A person who contends that the Department's administrative holding of loss of nationality or expatriation in his case is contrary to law or fact shall be entitled, upon written request made within a reasonable time after receipt of notice of such holding, to appeal to the Board of Appellate Review.

§ 50.61 Composition of the Board of Appellate Review in Nationality Cases.

The Board of Appellate Review (Part 7 of this Title 22) when considering an appeal under § 50.60 shall consist of two Regular Members and one ad hoc member. The ad hoc member shall be selected from a panel of five officers of the Department designated by the Deputy Under Secretary for Administration. Such officers shall be attorneys.

§ 50.62 Chairman.

One of the members of the Board shall be designated by the Deputy Under Secretary of State for Administration as Chairman. The chairman or his designee shall preside at all hearings of the Board and shall be empowered in all respects to regulate the conduct of the hearing and to pass on all issues relating thereto. The Chairman or his designee shall be empowered to administer oaths and affirmations.

§ 50.63 Functions of the Board.

The Board shall consider all appeals under § 50.60 and shall take any action it considers necessary and proper to the disposition of the cases appealed to it. The Board may adopt and make public rules of procedure approved by the Secretary.

§ 50.64 Scope of review on appeal.

The Board shall receive evidence and, if there is a hearing, hear argument on the facts and the law applicable to

the case under consideration. The Board shall not consider argument challenging the constitutionality of any law.

§ 50.65 Appearance before the Board.

Any party to any proceeding before the Board may appear in person or by or with his attorney or any other representative who has his written authority to represent him.

§ 50.66 Hearing before the Board.

The appellant shall be entitled, at his or his representative's request, to a hearing before the Board. The appellant may appear and testify in his own behalf and may present witnesses and offer evidence. The Passport Office may also present witnesses and offer other evidence and make argument. The appellant and witnesses may be examined by any member of the Board and by the representative of the Passport Office. If any witness whom the appellant or the Passport Office wishes to call is unable to appear personally, the Board may, in its discretion, accept an affidavit by the witness or order evidence to be taken by deposition. The appellant shall be entitled to be informed of all evidence before the Board and of the source of such evidence, and shall be entitled to confront and cross-examine any adverse witness. The Board may request a stipulation of facts prior to or at the beginning of the hearing and may request supplemental statements on issues presented to it or confirmation, verification, or authentication of any evidence submitted by or on behalf of the appellant.

§ 50.67 Admissibility of evidence.

The appellant and the Passport Office may introduce such evidence as the Board deems proper. Formal rules

of evidence shall not apply, but reasonable restrictions shall be imposed as to the relevancy, competency and materiality of evidence presented.

§ 50.68 Privacy of hearings.

Hearings shall be private. There shall be present at the hearing only the appellant, his counsel or representative, the members of the Board, official stenographers, Department employees, and the witnesses. Witnesses shall be present at the hearing only while actually giving testimony or when otherwise directed by the Board.

§ 50.69 Transcript of hearing.

A complete verbatim transcript shall be made of the hearing, if any, by a qualified reporter. Upon request, the appellant or his counsel shall have the right to inspect the complete transcript and to purchase a copy thereof.

§ 50.70 Record of the proceedings.

The record of the hearing shall consist of the stipulation of facts, if any, the evidence admitted the transcript of hearing and the appellant's file. If a hearing is not held, the record shall consist of the appellant's written petition, supporting evidence, and the appellant's file. All decisions of the Board shall be made on the basis of the record.

§ 50.71 Decision of the Board.

The decision shall be by majority vote, in writing, and shall set out with particularity the finding of fact and conclusions of law on which it is based.

§ 50.72 Notification of appellant.

The Board's decision shall be promptly communicated in writing to the appellant.